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August 15, 2005

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VIA E-MAIL & HAND DELIVERED

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2005 AUG 15 PM 3:56
OK D. Deke

**Re: Time Warner Cable Information Services (SC), LLC
Expansion of Certification for Rural ILEC Service Areas
Docket No. 2004-280-C**

Dear Mr. Terreni:

Enclosed for filing please find the petition for Rehearing or Reconsideration of Order No. 2005-412 of Time Warner Cable Information Services (SC), LLC. We are serving the same on Counsel for the Rural Carriers and the Office of Regulatory Staff. Please stamp the extra copy of this letter provided as proof of filing and return it with our courier.

Yours truly,

ROBINSON, MCFADDEN & MOORE, P.C.

Frank R. Ellerbe, III

Greencard 8/3/05
OK D. Deke

/bds

enclosures

cc/enc:

Julie Y. Patterson, Esquire (via e-mail & US Mail)
Ms. Charlene Keys (via email & U.S. Mail)
Benjamin P. Mustian, Esquire (via email & U.S. Mail)
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**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
Docket No. 2004-280-C**

IN RE:

Application of Time Warner Cable Information
Services (South Carolina), LLC, d/b/a
Time Warner Cable to Amend its Certificate
of Public Convenience and Necessity
to Provide Local Voice Services in
Service Areas of Certain Incumbent
Carriers who Currently Have a Rural Exemption

)
)
) PETITION FOR REHEARING OR
) RECONSIDERATION OF ORDER
) NO. 2005-412 OF TIME WARNER
) CABLE INFORMATION
) SERVICES (SOUTH CAROLINA),
) LLC
)
)

Pursuant to S.C. Code Section 58-9-1200 and 26 S.C. Regs. 103-836(4) Time Warner Cable Information Services (South Carolina), LLC ("TWCIS") submits this petition seeking reconsideration or rehearing of Order No. 2005-412. Although Order No. 2005-412's reasoning is open to interpretation, the Order contravenes both state and federal law under any possible reading. If the order reflects a ruling that competitive local exchange carriers ("CLECs") are not entitled to a certificate to serve rural areas until the Public Service Commission of South Carolina ("Commission") has pierced the rural exemption of 47 U.S.C. § 251(f), it is wrong: both state and federal law render it impermissible for the Commission to withhold a certificate on that basis. If the order reflects a ruling that TWCIS is not entitled to a certificate on the theory that it does not need one to provide the kind of service that it intends to provide, the order likewise contravenes both state and federal law: as a practical matter, TWCIS does need a certificate for that purpose, and, even if that were not so, lack of the immediate need for a certificate is not a valid ground for withholding one. TWCIS has satisfied the statutory criteria for certification which by itself requires the Commission to reverse its decision. In support of its

petition, TWCIS would show the following:

1. On August 1, 2005, the Commission issued Order No. 2005-412 in which it denied TWICS' request to amend its certificate to provide local voice services in the service areas of Farmers Telephone Cooperative, Inc.; Fort Mill Telephone Co., d/b/a Comporium Communications, Inc.; Home Telephone Co., Inc.; PBT Telecom, Inc.; and St. Stephen Telephone Co. (collectively "ILECs"). Counsel was served with Order No. 2005-412 by certified mail on August 3, 2005.

2. TWCIS submits that its substantial rights have been prejudiced because the findings, inferences, conclusions, and decisions are

- a. in error of law;
- b. violate statutory provisions;
- c. clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and
- d. arbitrary and capricious or characterized by an abuse of discretion.

TWCIS respectfully petitions the Commission to rehear and reconsider its Order No. 2005-412 for the following reasons.

**THE ORDER'S FINDINGS AND CONCLUSIONS OF LAW
ARE NOT SUPPORTED BY THE RECORD**

3. The Commission's order erroneously finds that there is a failure of proof regarding the original application. Order No. 2005-214 indicates that the Company seeks only the authority to enter into negotiations toward interconnection agreements with the ILECs in spite of testimony which repeatedly and directly contradicts this assertion. The Commission focused on a small portion of Ms. Patterson's testimony in which she explained the impact of the

Vonage ruling on the Company's retail VoIP service offering in the context of MCI's pending arbitration with the ILECs. At the same time the Commission ignored numerous instances in which Ms. Patterson testified that TWCIS seeks to amend its initial certification order to be a full-fledged CLEC in the service territories of the ILECs. Tr. 18, 29, 34, 35, & 119. Ms. Patterson specifically indicated that TWCIS sought authority to provide all types of services including both retail and wholesale. Tr. 36 & 56. The Order is clearly erroneously in light of the substantial evidence of the whole record.

4. The Commission's order erroneously finds that there is a failure of proof because TWCIS failed to request a waiver of the ILECs rural exemptions under 47 U.S.C.A. § 251(f)(1) in this proceeding. Neither the federal Telecommunications Act nor S.C. Code Section 58-9-280 require a CLEC to pierce the rural exemption in order to be certificated. The ILECs' own expert witness indicated that certification does not eliminate the ILECs' rural exemption or prevent the ILEC from seeking protection from other obligations imposed under Section 251(b) of the Telecommunications Act. Tr. 166-167.

5. Section 251(f)(1) provides that a rural telephone company is exempt from certain interconnection obligations until the ILEC receives a bona fide request for interconnection and the State Commission determines that such a request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254. 47 U.S.C.A. § 251(f)(1)(A). The ILEC is not exempt from competition by firms that can compete without invoking rights under Section 251(c).

6. Section 253(a) prohibits the states from barring competition in rural areas. The Commission's order allows the ILECs to effectively prohibit competition within their service areas until such time as they choose to interconnect with CLECs. The FCC has indicated that

requirements which allow “incumbent LECs to prohibit—legally, absolutely, and entirely at their own discretion—the ability to provide local exchange telecommunications service” are insurmountable barriers to entry prohibited by the federal Act. *In the Matter of Silver Star Telephone Co., Inc. Petition for Preemption*, 13 FCCR 16,356, 13 FCC Rcd. 16356, ¶ 3 (1998). *See also In the Matter of AVR, LP, dba Hyperion of Tennessee Petition for Preemption*, 14 FCCR 11,064, 14 FCC Rcd. 11064, ¶13 – 15 (1999). *See also RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000).

7. The Commission’s holding that TWCIS should have sought to pierce the rural exemption in this certification proceeding is clearly erroneous. The Commission has required no other CLEC to pierce a rural exemption in order to be certificated throughout the State of South Carolina. Tr. 207 - 208. The ILECs’ testimony indicated that the South Carolina Telephone Coalition (“SCTC”) entered into stipulations with all other CLEC applicants providing that in exchange for the CLEC’s agreement to provide advance notice to the Commission and the ILEC prior to offering service in that ILEC’s area, the SCTC would not oppose the CLEC’s application for certification. Tr. 207-208. The SCTC agreed with other CLECs on the stipulation primarily because other CLEC applicants had no facilities within the rural areas; and therefore, did not have the actual capability to provide service. Tr. 208, l. 9-21. While the federal Act protects rural telephone companies by exempting them from certain interconnection obligations, it does not provide for rural telephone companies to be protected from a competition in the market through the state certification process. The Act prohibits an outright ban of competition and prohibits states from impeding competition. *AT&T v. Iowa Utilities*, 525 U.S. 366, 371 (1999).

**THE ORDER ERRONEOUSLY HOLDS THAT TWCIS
HAS THE ABILITY TO ENTER INTO INTERCONNECTION AGREEMENTS**

8. The Commission's ruling that the Company possesses the ability to negotiate interconnection agreements without being certificated violates statutory law. S.C. Code Section 58-9-280(C)(1) provides that the Commission is to determine the requirements applicable to all local carriers and that the requirements shall be consistent with federal law and shall "provide for the reasonable interconnection of facilities between all *certificated* local telephone service providers upon a bona fide request for interconnection..." S.C. Code § 58-9-280(C)(1) (Supp. 2004)(emphasis added). The ILECs expert agreed that TWCIS cannot begin the process for interconnection until TWCIS is certificated by the Commission. Tr. 166.

9. The Commission's ruling that TWCIS possesses the ability to enter into Section 251 negotiations without an expanded certificate is also erroneous as a practical matter. Incumbent carriers will not sell services to a CLEC until that CLEC provides proof of certification. See Interconnection Agreements between Horry Telephone Cooperative and Global Connection, filed November 1, 2004, Docket No. 2004-317-C, § 1.8 (The effective date shall be no earlier than proof of CLEC certification in the jurisdiction); Alltel and BellSouth Long Distance, filed August 2, 2005, Docket No. 2005-228-C, § 1.4 (Prior to execution of this Agreement BSLD agrees to provide ALLTEL in writing BSLD's CLEC certification....); BellSouth and KMC Data, filed July 18, 2005, Docket No. 2005-214-C (Prior to execution of this Agreement, BellSouth may request and KMC agrees to provide BellSouth in writing KMC's CLEC certification....).

**THE COMMISSION'S DECISION IS ARBITRARY AND
CAPRICIOUS SINCE TWCIS MET THE
STATUTORY CERTIFICATION REQUIREMENTS**

10. S.C. Code Section 58-9-280(B) provides the statutory requirements for a certificate authorizing a telephone utility to provide local telephone service in the territory of an incumbent local exchange carrier. The Commission has twice held that TWCIS meets the statutory requirements for a certificate. In Order No. 2004-213, the Commission found that TWCIS possesses the technical and managerial expertise and financial resources to commence operations as a telecommunications service provider in South Carolina. See Order 2004-213, p. 9, ¶ 3. The Commission has also ruled that TWCIS provision of service won't adversely impact the availability of affordable local exchange service, that TWCIS would support universally available telephone service at affordable rates, and that the service will meet the Commission's service standards. Order 2004-213, p. 10, ¶ 4-6.

11. The Commission recently found that TWCIS meets the statutory requirements to expand its certificate within the area of a rural telephone company, Alltel South Carolina, Inc. In Order No. 2005-385 amended July 27, 2005, by Order No. 2005-385(A), the Commission granted the relief sought in the Application based upon the verified testimony of Ms. Patterson in the Alltell docket and the testimony of Ms. Patterson in this docket. The Commission again held on July 27, 2005, that TWCIS continues to meet all statutory requirements for the provision of service as a CLEC as delineated in S.C. Code Ann. Section 58-9-280 (Supp. 2004). Amended Order 2005-385(A), p. 5, ¶ 6.

12. Failure of the Commission to correct Order 2005-412 would result in a violation of the S.C. Administrative Procedures Act, which requires that the final decision or order in a contested case be based on the record before the agency. S.C. Code § 1-23-350. The testimony of

Julie Patterson specifically addressed each of the statutory requirements of S.C. Code Section 58-9-280(B). Tr. 14-16, 21-22, 25-26. The testimony of Ms. Patterson repeatedly indicated that TWICs was seeking

authority as a fully regulated competitive local exchange carrier...to operate and provide various telecommunications services in the areas covered by the Coalition incumbent LECs. So, we are here today simply to expand our operating territory into these other areas. We showed last year, today have the same...the same financial, technical and managerial capabilities as we were found to have had a year ago, and in fact have enhanced and added to our technical and managerial capabilities on the telecommunications side since last year.

Tr. 28, l. 9-21. See also Tr. 29, 34, 35, 102-103.


Ms. Patterson emphasized during the hearing that TWCIS was seeking “full CLEC authority to provide different services than those VoIP services. We will be a fully regulated, competitive local exchange carrier and interexchange carrier subject to the Commission’s full jurisdiction. I want there to be no question about that.” Tr. 30, l. 12-17. See also Tr. 36, l. 14-15. The Order’s finding of fact and conclusion of law that the original application must be denied as moot made on representations made at the hearing is therefore arbitrary, capricious, and characterized by an abuse of discretion.

Time Warner Cable Information Services (South Carolina), LLC respectfully requests that the Commission issue an order

- A. reversing its decision in Order No. 2005-412,
- B. granting TWCIS’ application to expand its certificate to include the service areas of the ILECs, and
- C. granting such other relief as is just and proper.

Dated this 15th day of August, 2005.

ROBINSON, McFADDEN & MOORE, P.C.

By _____

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(South Carolina), LLC

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2003-362-C
2004-280-C**

In Re:

Application of Time Warner Cable
Information Services (South Carolina),
LLC, d/b/a Time Warner Cable to
Amend its Certificate of Public
Convenience and Necessity to Provide
Interexchange and Local Voice
Services in Service Areas of Certain
Incumbent Carriers who Currently
Have a Rural Exemption

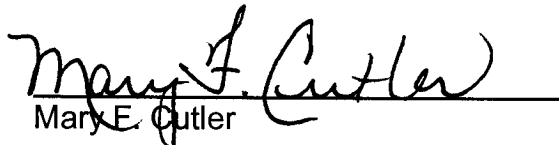
CERTIFICATE OF SERVICE

This is to certify that I, Mary F. Cutler, a legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the persons named below the **Petition for Rehearing or Reconsideration of Order No. 2005-412 of Time Warner Cable Information Services (SC), LLC** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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Dated at Columbia, South Carolina this 15th day of August 2005.


Mary F. Cutler